No. 86-1543

# In the Supreme Court of the United States

OCTOBER TERM, 1986

PETERSON PAINTING, INC., PETITIONER

*v.*

NATIONAL LABOR RELATIONS BOARD

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## SUPPLEMENTAL MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

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In its supplemental brief, petitioner asks the Court to remand this case to the court of appeals with instructions that the court of appeals in turn remand it to the Board for reconsideration in light of the Board's decision in *John Deklewa & Sons*, 282 N.L.R.B. No. 184 (Feb. 20, 1987). There is no merit to that suggestion.

1. In *Deklewa*, the Board overruled certain of its prior decisions and held, in pertinent part, that upon the expiration of a pre-hire agreement under Section 8(f) of the National Labor Relations Act (the Act), 29 U.S.C. 158(f), "the signatory union will enjoy no presumption of majority status, and either party may repudiate the 8(f) bargaining relationship." *Deklewa*, 282 N.L.R.B. No. 184, at 8. The Board further held (*id.* at 40-42 (citation omitted)) that it would follow its "usual practice" and apply the decision in *Deklewa* retroactively "to all pending cases in whatever stage."

2. Petitioner has not shown that *Deklewa* has any application to its bargaining relationship with the Union. *Deklewa* applies where the bargaining relationship is based on Section 8(f) rather than actual majority status, which the Union enjoyed here.[1]

In any event, petitioner is not entitled to rely on *Deklewa*, having failed to assert before the Board that it had an 8(f) relationship with the Union. Section 10(e) of the Act, 29 U.S.C. 160(e), provides that "[n]o objection that has not been urged before the Board * * * shall be considered by the court, unless the failure or neglect to urge such objection shall be excused [by] extraordinary circumstances." *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645, 665-666 (1982). The fact that *Deklewa* had not been decided does not constitute "extraordinary circumstances" that excuse petitioner's failure to assert 8(f) status. As this Court has observed, even where an agency has "a predetermined policy * * * which would have required it to overrule the objection if made[,]" a litigant is required to raise an issue before the agency in order to preserve it for review. *United States* v. *Tucker Truck Lines*, 344 U.S. 33, 37 (1952).

3. Finally, petitioner has misread (Supp. Br. 6) the Board's statement that *Deklewa* applies "to all pending cases in whatever stage." In elaborating in *Deklewa* on its "usual practice" governing retroactivity, the Board relied (282 N.L.R.B. at 42) on *Deluxe Metal Furniture Co.*, 121 N.L.R.B. 995 (1958), in which the Board stated (121

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[1]Petitioner conceded, and the Board found (Pet. App. 19a), that during the term of the agreement the Union in fact represented a majority of the employees in the multi-employer unit. The Board said that "the record affirmatively shows that the Union in fact represented all [of petitioner's] unit employees through June 30, 1983" (Pet. App. 19a-20a), when the contract expired and petitioner withdrew recognition from the Union.

N.L.R.B. at 1006) that it would apply new rules retroactively to any case "which has not yet been decided, because it has not reached the Board's level or is at one of the other stages of the administrative process such as the hearing." The present case was not, when *Deklewa* was decided, "pending" in this sense.

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